Calendar No. 1055

91ST CONGRESS
2d Session

SENATE

REPORT
No. 91-1050

ELBERT C. MOORE

JULY 30, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2407]

The Committee on the Judiciary, to which was referred the bill (H.R. 2407) for the relief of Elbert C. Moore, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation, as amended, is to pay Elbert C. Moore, of Clearwater, Fla., $1,500 in full settlement of his claims against the United States for expenses arising from the salvage of an Air Force Ryan Firebee drone in the Gulf of Mexico on April 24, 1963.

STATEMENT

The facts of the case are found in the House report as follows:

> The Department of the Air Force in its report to the committee on the bill indicated that it would have no objection to the bill provided it was amended as recommended by the committee. The target drone was launched at Tyndall Air Force Base, Fla., on February 6, 1963, but was lost over the Gulf of Mexico due to adverse weather, and after 2 days the search was abandoned and the drone was subsequently removed from accountable records of the Air Force. On April 24, 1963, the drone was discovered afloat about 80 miles southwest of Tarpon Springs by a commercial fisherman, Mr. William Davenport, who was operating the *Laura C* under lease on a

percentage-of-profits basis. Mr. Davenport, being unable to notify the Coast Guard, thereupon voluntarily interrupted his fishing trip and spent approximately 30 hours towing the drone to Tarpon Springs where it was subsequently returned to Air Force custody. An examination of the drone at MacDill Air Force Base revealed that it did not carry explosives and that only the flight control box, valued on the stock list at $13,800, was salvageable. It is understood that this item was returned to serviceable stocks at Tyndall Air Force Base.

Shortly after returning the drone to the Air Force, Mr. Davenport, through an attorney, indicated a desire to make a salvage claim. A drone is an aircraft and, therefore, section 9802 of title 10, United States Code, which relates only to the salvage of an Air Force vessel, is inapplicable. Moreover, such a claim could not be considered on a contract basis as there was no prior publication of an offer of reward. Nevertheless, in view of the benefit received by the Air Force, the claim appeared meritorious if the amount of damages sustained or cost incurred could be substantiated.

On June 14, 1963, Mr. Davenport told the claims officer at MacDill Air Force Base that mechanical repairs to the vessel necessitated by the towing incident had been made by him at a total cost of $100 by using spare parts in his possession and used parts obtained at very little cost, and that he also suffered a $350 loss of fishing profits. There were only 900 pounds of fish aboard the vessel at the time of the salvage tow and the fishing trip normally would not have been terminated until 4,000 to 7,000 pounds of fish had been caught or until at least 10 days of fishing had elapsed.

On October 23, 1963, Mr. Davenport's attorney presented a claim for loss of profits, temporary repairs, and damage to the vessel in the amount of $7,500. The evidence presented by Mr. Davenport showed an estimate of $1,200 for repair of damage to the engine and transmission, $300 to repair of the starboard chines, plus the orignally stated amount of $450 to cover the temporary repairs made and the loss of anticipated profits.

When an ex gratia settlement agreement of $1,950 was sent to Mr. Davenport, it was discovered that he was not the owner of the vessel as he had previously represented and therefore payment of the award was withheld (although he was eventually paid $450 in full satisfaction of his claim).

On January 20, 1965, the person named in H.R. 2407, Mr. Elbert C. Moore, the owner of the *Laura C*, presented, through his attorney a claim for $24,910, which was itemized essentially as follows:

(a) Initial damage to the vessel resulting from the salvage tow and deterioration due to the financial inability of the owner to have repairs made ($7,500).

(b) Loss of use of the fishing vessel for a period of 21 months at an estimated loss of $800 per month ($16,800).

(c) Storage of the vessel after the damage ($500).

(d) Expenses incurred for supplies and other materials in the salvage trip ($110).

The committee notes that the amounts claimed were not substantiated by business records, itemized bills or estimates of repair, or evidence of the nonavailability of a replacement vessel. One estimate, dated May 5, 1965, showed undescribed repair costs of $141.83, including the cost of some repainting. Mr. Frank Levinson, Jr., Clearwater Bay Marine Ways, Inc., stated that he submitted an estimate of $2,500 for the cost of repair of the vessel's chines when he inspected it in April 1963, but there is no record of such an estimate having been submitted to the Air Force. Mr. Levinson also stated that his inspection of the vessel on March 15, 1965, revealed that the hull, frame, and keel had deteriorated to such an extent that it was beyond economical repair.

Neither the operator (Mr. Davenport) nor the owner (Mr. Moore) of the *Laura C* requested a joint survey of the damage sustained in the April 24, 1963, salvage operation. However, a survey report made on December 23, 1961, in connection with the purchase of the vessel by Mr. Moore, noted that 12 active wormholes in the underwater hull required attention and indicated certain needed painting and other minor repairs. The survey showed that the engine was installed new in November 1959, and it appeared to be in excellent running condition. The value of the vessel on the date the survey was made was estimated to be between $5,500 and $6,000 with a replacement cost new of about $14,000. No evidence has been presented to show that the worms in the hull were killed, the holes were filled, and other repairs accomplished, as recommended.

This is a case where the claims of Mr. Davenport and Mr. Moore were not cognizable under any statute available to the Air Force for the administrative settlement of claims. Under the act of August 28, 1958, Public Law 85–804 (50 U.S.C. 1431 et seq.), as implemented by Air Force Regulation 67–5, where a reward has been offered for the recovery of lost Air Force property, there is authority to pay up to $500 for aircraft and missiles and lesser amounts for other items. There was, however, no offer of reward for the recovery of the drone in question and therefore this contract authority is not applicable in the present case. (Subsequent to Feb. 6, 1963, all drones launched at Tyndall Air Force Base have an offer stenciled on their sides.)

Although the Secretary of the Navy is specifically authorized to pay a reward of not more than $500 for information leading to the discovery of missing naval property or its recovery (10 U.S.C. 7209), there is no counterpart statutory provision applicable to the Army or Air Force. Consequently, any administrative payments of the award to the operator or owner of the salvage vessel could be made only on an "ex gratia" basis from the special funds otherwise available to the Secretary of the Air Force for emergencies and extraordinary expenses. Such payments were determined justified in view of the benefit to the Air Force from the recovery of the valuable flight control box for possible future use.

As stated, the Secretary of the Air Force had considered an award of $1,950 to Mr. Davenport (the operator) to be appropriate at the time Mr. Davenport was believed to be the owner. However, when it was determined that Mr. Moore was the owner of the vessel, it was determined that an award to Mr. Davenport in excess of $450 would not be proper. On May 12, 1966, Mr. Davenport was paid $450 in full satisfaction and final settlement of his claim against the United States.

In considering the claim of Mr. Moore (the owner), it was determined that there was no reasonable or legal basis for holding the Government responsible for the loss of use of the fishing vessel caused by his financial inability to repair the damage. The committee agrees that the Government's pecuniary liability, if any, should not exceed the cost of repairing whatever damage resulted directly from the towing incident and the cost of obtaining a substitute vessel for a reasonable period of time, while the repairs were being made. The Air Force noted that damage to the vessel in excess of $1,500 resulted from its continued neglect after the retrieval and the claims for other damages were not supported.

On the basis of all the evidence submitted, the Air Force concluded that it was appropriate to make Mr. Moore an "ex gratia" payment of $1,500 from the special funds of the Secretary of the Air Force to compensate him for the damage to his vessel as the result of the salvage tow. The Secretary's letter of April 6, 1966, to the owner's attorney offering the award, stated that the rights of the parties who have security interests in the vessel must also be considered. Therefore, the settlement agreement was prepared for the signature of the owner and also the representatives of the lien holders (the Caladesi National Bank, Dunedin, Fla.; John J. Spanolios; and the General Engine and Equipment Co.). The settlement offer was not accepted as Mr. Moore contended that he should receive the cost of replacing his vessel ($14,000) and be paid for loss of revenue for 3 years and the accumulated cost of storage.

Certain additional legal aspects of the Davenport and Moore claims should be considered. In the absence of conclusive evidence to the contrary, there is a presumption that the Government cannot abandon its property. The operator of the salvage vessel, therefore, did not acquire title to the drone or its contents at the time it was recovered from the Gulf of Mexico.

The Air Force further noted that there is no established rule on the allowance for salvage in admiralty cases. In admiralty courts, an allowance for salvage is necessarily largely a matter of discretion which cannot be determined with precision by application of exact rules. Mr. Moore's attorney contends that the use of a boat in salvage should carry a rate of 10 percent of the value of the salvaged product. In the present case, the drone was determined to be worthless except for the flight control box which had a stocklist value of $13,800. Thus, a salvage award of $1,380 would appear reasonable if the attorney's theory were correct.

At the time the Davenport and Moore claims were considered administratively, it was the view of the military departments that no admiralty statute was available for the settlement of claims for salvage services with respect to military property other than vessels (10 U.S.C. 4802, 7622, and 9802). A drone is an aircraft and not a vessel within the meaning of these admiralty statutes.

In discussing the law applicable to salvage claims, the Air Force noted that on October 12, 1966, however, the Acting Assistant Attorney General, in a letter to the Air Force, rendered an opinion to the effect that section 9 of the so-called Suits in Admiralty Act (46 U.S.C. 749) would permit the Secretary of the Air Force to settle administratively a salvage claim which related to aircraft cargo. As enacted in 1920, section 2 of the act (46 U.S.C. 742) waived sovereign immunity only in the cases of agencies possessing or operating merchant vessels and section 9 limited agency authority to settle claims to those cognizable under section 2. However, section 2 of the act was amended in 1960 by Public Law 86–770 (74 Stat. 912) to provide that causes of action would lie "if a private person or property were involved," thereby removing the previous limitation to merchant vessels. Thus, section 2 of the Suits in Admiralty Act which relates to libel in personam now grants a plenary waiver of immunity from suit on *all* maritime claims, including those for nonvessel salvage, and section 9 of that act, which inadvertently was not amended, still relates to any department of the Government "having control of the possession or operation of any merchant vessel * * *." The Attorney General's opinion states that a restrictive reading of section 9 is not in keeping with the congressional intent to liberalize the act as evidenced by the 1960 amendment of section 2 and it would clearly permit a suit for salvage services. There is, however, a considerable body of legal opinion to the contrary with respect to the authority of the Department of the Air Force to make such a settlement in the absence of an amendment of the term "merchant vessel" in section 9 of the Suits in Admiralty Act. In addition, the term "department" refers only to an executive department and not a military department in the absence of specific evidence to the contrary.

Although the owner (Moore) presented his claim within the 2-year period authorized for claims under the Suits in Admiralty Act, the consideration of an administrative claim does not toll the statute of limitations for suit purposes (46 U.S.C. 745). The failure of this claimant to take timely action in pursuing his remedy in court under the Suits in Admiralty Act cannot be considered the fault of the United States. Although this fact is not contested, it is not the duty of an agency of the Government to advise prospective claimants of a statutory period of limitation. The Federal courts and the Comptroller General have held that ignorance of the law, or an administrative failure to give notice of a statute of limitations, will not extend, suspend, or postpone the running of such a statute (*Art Center School* v. *United States*,

142 F. Supp. 916; *Anderegg* v. *United States*, 171 F. 2d 127, cert. den. 69 Sup. Ct. 937; 15 Comp. Gen. 323).

The Department of the Air Force has stated that it is generally opposed to the enactment of legislation which, like H.R. 14788, would obviate the effect of the running of the statute of limitations on a claim and give preferential treatment to one claimant over others who are similarly situated.

In indicating that it had no objection to legislative relief provided it be limited to a payment of $1,500, the Air Force summarized its position as follows:

"In summary, the Air Force had abandoned its search for the drone and had not offered a reward for its return. It is recognized, however, that the salvage had some merit in that lost property was returned to Government control and that the amount of $450 paid to the operator of the vessel, Mr. William Davenport, was reasonable compensation for that voluntary act. The Department of the Air Force is not opposed to favorable consideration of the bill for relief for the owner of the vessel, Mr. Moore, provided that the amount of relief is reduced to $1,500. This would be reasonable compensation in view of all the circumstances of the case, including the well-recognized legal duty of a claimant to minimize his damages. The claim for loss of use and for storage obviously does not meet that duty. The claimant did not meet the legal duty of affording the Air Force the opportunity for a survey of claimed damages, nor did he substantiate his claimed loss of use of $800 per month. This proof would have involved showing the loss of profits that had been earned before the drone was salvaged, as well as demonstrating the nonavailability of a replacement vessel during the time his vessel could have been repaired, instead of being stored for 21 months while it rotted, sank, and became a total loss."

The committee agrees that under all the circumstances of the matter, a payment of $1,500 is an equitable settlement and would provide adequate compensation for the expenses and losses suffered under the circumstances. Accordingly, it is recommended that the bill, amended to provide for a payment of that amount, be considered favorably.

In agreement with the views of the House, the committee recommends the bill favorably.

Attached hereto and made a part hereof is the report of the Air Force on a similar bill in the 90th Congress.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, D.C., May 31, 1968.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Air Force with respect to H.R. 14788, 90th Congress, a bill for the relief of Elbert C. Moore.

The purpose of H.R. 14788 is to direct the Secretary of the Treasury to pay the sum of $24,910 to Mr. Elbert C. Moore, Clearwater, Fla.,

in full settlement of his claims against the United States for his expenses arising from the salvage in the Gulf of Mexico of an Air Force Ryan Firebee Q2C jet target drone on April 24, 1963.

Although this bill relates only to the claim of Mr. Elbert C. Moore, there was also a claim of Mr. William Davenport that arose out of the same salvage operation involving the use of the small fishing vessel, *Laura C*. These claims, which were submitted to the Air Force, are so closely related that it is necessary to discuss them both so that all of the facts, circumstances, and applicable law may be considered by the Congress.

The Air Force records show a target drone was launched at Tyndall Air Force Base, Fla., on February 6, 1963, but was lost over the Gulf of Mexico due to adverse weather, and after 2 days the search was abandoned and the drone was subsequently removed from accountable records. On April 24, 1963, the drone was discovered afloat about 80 miles southwest of Tarpon Springs by a commercial fisherman, Mr. William Davenport, who was operating the *Laura C* under lease on a percentage-of-profits basis. Mr. Davenport, being unable to notify the Coast Guard, thereupon voluntarily interrupted his fishing trip and spent approximately 30 hours towing the drone to Tarpon Springs where it was subsequently returned to Air Force custody. An examination of the drone at MacDill Air Force Base revealed that it did not carry explosives and that only the flight control box, valued on the stock list at $13,800, was salvageable. It is understood that this item was returned to serviceable stocks at Tyndall Air Force Base.

Shortly after returning the drone to the Air Force, Mr. Davenport, through an attorney, indicated a desire to make a salvage claim. A drone is an aircraft and, therefore, section 9802 of title 10, United States Code, which relates only to the salvage of an Air Force vessel, is inapplicable. Moreover, such a claim could not be considered on a contract basis as there was no prior publication of an offer of reward.

Nevertheless, in view of the benefit received by the Air Force, the claim appeared meritorious if the amount of damages sustained or cost incurred could be substantiated.

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When an "ex gratia" settlement agreement of $1,950 was sent to Mr. Davenport, it was discovered that he was not the owner of the

vessel as he had previously represented and therefore payment of the award was withheld (although he was eventually paid $450 in full satisfaction of his claim).

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(*d*) Expenses incurred for supplies and other materials in the salvage trip ($110).

The amounts claimed have not been substantiated by business records, itemized bills or estimates of repair, or evidence of the nonavailability of a replacement vessel. One estimate, dated May 5, 1965, showed undescribed repair costs of $141.83, including the cost of some repainting. Mr. Frank L. Levinson, Jr., Clearwater Bay Marine Ways, Inc., stated that he submitted an estimate of $2,500 for the cost of repair of the vessel's chines when he inspected it in April 1963, but there is no record of such an estimate having been submitted to the Air Force. Mr. Levinson also stated that his inspection of the vessel on March 15, 1965, revealed that the hull, frames, and keel had deteriorated to such an extent that it was beyond economical repair.

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The claims of Mr. Davenport and Mr. Moore were not cognizable under any statute available to the Air Force for the administrative settlement of claims. Under the act of August 28, 1968, Public Law 85–804 (50 U.S.C. 1431 et seq.) as implemented by Air Force Regulation 67–5, where a reward has been offered for the recovery of lost Air Force property, there is authority to pay up to $500 for aircraft and missiles and lesser amount for other items. There was, however, no offer of reward for the recovery of the drone in question and therefore this contract authority is not applicable in the present case. (Subsequent to February 6, 1963, all drones launched at Tyndall Air Force Base have an offer stenciled on their sides.)

Although the Secretary of the Navy is specifically authorized to pay a reward of not more than $500 for information leading to the discovery of missing naval property or its recovery (10 U.S.C. 7209), there is no counterpart statutory provision applicable to the Army or

Air Force. Consequently, any administrative payments of the award to the operator or owner of the salvage vessel could be made only on an "ex gratia" basis from the special funds otherwise available to the Secretary of the Air Force for emergencies and extraordinary expenses. Such payments were determined justified in view of the benefit to the Air Force from the recovery of the valuable flight control box for possible future use.

As stated, the Secretary of the Air Force had considered an award of $1,950 to Mr. Davenport (the operator) to be appropriate at the time Mr. Davenport was believed to be the owner. However, when it was determined that Mr. Moore was the owner of the vessel, it was determined that an award to Mr. Davenport in excess of $450 would not be proper. On May 12, 1966, Mr. Davenport was paid $450 in full satisfaction and final settlement of his claim against the United States.

In considering the claim of Mr. Moore (the owner), it was determined that there was no reasonable or legal basis for holding the Government responsible for the loss of use of the fishing vessel caused by his financial inability to repair the damage. The Government's pecuniary liability, if any, should not exceed the cost of repairing whatever damage resulted directly from the towing incident and the cost of obtaining a substitute vessel for a reasonable period of time, while the repairs were being made. Damage to the vessel in excess of $1,500 resulted from its continued neglect after the retrieval. The claims for other damages were not supported. It may be observed, parenthetically, that even if the Government's liability for loss of use of the vessel were conceded, the claimed amount of $16,800 would represent a return of $800 a month or $9,600 a year free and clear on an investment of $5,000.

On the basis of all the evidence submitted, it was concluded appropriate to make Mr. Moore an "ex gratia" payment of $1,500 from the special funds of the Secretary of the Air Force to compensate him for the damage to his vessel as the result of the salvage tow. The Secretary's letter of April 6, 1966, to the owner's attorney offering the award, stated that the rights of the parties who have security interests in the vessel must also be considered. Therefore, the settlement agreement was prepared for the signature of the owner and also the representatives of the lien holders (the Caladesi National Bank, Dunedin, Fla.; John J. Spanolios; and the General Engine & Equipment Co.). The settlement offer was not accepted as Mr. Moore contended that he should receive the cost of replacing his vessel ($14,000) and be paid for loss of revenue for 3 years and the accumulated cost of storage.

Certain additional legal aspects of the Davenport and Moore claims should be considered. In the absence of conclusive evidence to the contrary, there is a presumption that the Government cannot abandon its property. The operator of the salvage vessel, therefore, did not acquire title to the drone or its contents at the time it was recovered from the Gulf of Mexico.

There is no established rule on the allowance for salvage in admiralty cases. In admiralty courts, an allowance for salvage is necessarily largely a matter of discretion which cannot be determined with precision by application of exact rules. Mr. Moore's attorney contends that the use of a boat in salvage should carry a rate of 10 per-

cent of the value of the salvaged product. In the present case, the drone was determined to be worthless except for the flight control box which had a stocklist value of $13,800. Thus, a salvage award of $1,380 would appear reasonable if the attorney's theory were correct.

At the time the Davenport and Moore claims were considered administratively, it was the view of the military departments that no admiralty statute was available for the settlement of claims for salvage services with respect to military property other than vessels (10 U.S.C. 4802, 7622, and 9802). A drone is an aircraft and not a vessel within the meaning of these admiralty statutes.

On October 12, 1966, however, the Acting Assistant Attorney General, in a letter to the Air Force, rendered an opinion to the effect that section 9 of the so-called Suits in Admiralty Act (46 U.S.C. 749) would permit the Secretary of the Air Force to settle administratively a salvage claim which related to aircraft cargo. As enacted in 1920, section 2 of the act (46 U.S.C. 742) waived sovereign immunity only in the cases of agencies possessing or operating merchant vessels and section 9 limited agency authority to settle claims to those cognizable under section 2. However, section 2 of the act was amended in 1960 by Public Law 86–770 (74 Stat. 912) to provide that causes of action would lie "if a private person or property were involved", thereby removing the previous limitation to merchant vessels. Thus, section 2 of the Suits in Admiralty Act which relates to libel in personam now grants a plenary waiver of immunity from suit on all maritime claims, including those for nonvessel salvage, and section 9 of that act, which inadvertently was not amended, still relates to any department of the Government "having control of the possession or operation of any merchant vessel * * *". The Attorney General's opinion states that a restrictive reading of section 9 is not in keeping with the congressional intent to liberalize the act as evidenced by the 1960 amendment of section 2 and it would clearly permit a suit for salvage services. There is, however, a considerable body of legal opinion to the contrary with respect to the authority of the Department of the Air Force to make such a settlement in the absence of an amendment of the term "merchant vessel" in section 9 of the Suits in Admirality Act. In addition, the term "department" refers only to an executive department and not a military department in the absence of specific evidence to the contrary.

Although the owner (Moore) presented his claim within the 2-year period authorized for claims under the Suits in Admiralty Act, the consideration of an administrative claim does not toll the statute of limitations for suit purposes (46, U.S.C. 745). The failure of this claimant to take timely action in pursuing his remedy in court under the Suits in Admiralty Act cannot be considered the fault of the United States. Although this fact is not contested, it is not the duty of an agency of the Government to advise prospective claimants of a statutory period of limitation. The Federal courts and the Comptroller General have held that ignorance of the law, or an administrative failure to give notice of a statute of limitations, will not extend, suspend, or postpone the running of such a statute (*Art Center School* v. *United States*, 142 F. Supp. 916; *Anderegg* v. *United States*, 171 F. 2d 127, cert. den. 69 Sup. Ct. 937; 15 Comp. Gen. 323).

The Department of the Air Force is generally opposed to the enactment of legislation which, like H.R. 14788, would obviate the effect of the running of the statute of limitations on a claim and give preferential treatment to one claimant over others who are similarly situated.

In summary, the Air Force had abandoned its search for the drone and had not offered a reward for its return. It is recognized, however, that the salvage had some merit in that lost property was returned to Government control and that the amount of $450 paid to the operator of the vessel, Mr. William Davenport, was reasonable compensation for that voluntary act. The Department of the Air Force is not opposed to favorable consideration of the bill for relief for the owner of the vessel, Mr. Moore, provided that the amount of relief is reduced to $1,500. This would be reasonable compensation in view of all the circumstances of the case, including the well-recognized legal duty of a claimant to minimize his damages. The claim for loss of use and for storage obviously does not meet that duty. The claimant did not meet the legal duty of affording the Air Force the opportunity for a survey of claimed damages, nor did he substantiate his claimed loss of use of $800 per month. This proof would have involved showing the loss of profits that had been earned before the drone was salvaged, as well as demonstrating the nonavailability of a replacement vessel during the time his vessel could have been repaired, instead of being stored for 21 months while it rotted, sank, and became a total loss.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

J. William Doolittle,
Assistant Secretary of the Air Force
Manpower and Reserve Affairs.

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